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No. 97-8214

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

ANGEL FRANCISCO BREARD,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

Imminent Execution Scheduled
April 14, 1998

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Angel Francisco Breard, pursuant to Rule 15(6), Rules of the Supreme Court of the United States, files this Reply Brief in response to Respondent's Brief in Opposition in order to address points raised in the Brief in Opposition.

REASONS FOR GRANTING THE WRIT

-1-

The Vienna Convention Claim Is an Important Issue of Federal Law

Respondent seeks to avoid dealing with the Vienna Convention by contending that the "rights" afforded by it are not individual rights enforceable by a state prisoner in a federal habeas proceeding. Respondent's position is contrary: (1) to the language of Article 36 of the Vienna Convention ("the said authorities shall inform the person concerned without delay of his rights . . . ."); (2) to the position of the United States Department of State (Article 36 of the Vienna Consular Convention provides that "the host government must notify the arrestee without delay of the arrestee's right to communicate with the American Consul," United States Department of State, 7 Foreign Affairs Manual 411.1 (1984); App. 280), and (3) to case law (Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (Vienna Convention "provides rights to individuals rather than merely setting out the obligations of signatories"), and Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) (Vienna Convention requires arresting government to notify foreign national "of his right to contact his consul")). Rather than demonstrate that Breard's Petition lacks merit, Respondent has left no doubt that Breard has raised questions of federal law which have not been, but should be, settled by this Court. Rule 10, Rules of the Supreme Court of the United States.

Respondent's citation to Reed v. Farley, 512 U.S. 339 (1994) is inapposite because Breard has not claimed merely a violation of a treaty or federal statute. Rather, Breard contended below that

the violation of his Article 36 rights under the Convention gave rise to claims under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *See* Petition in the District Court, ¶ 49, App. 122.

The importance of the Vienna Convention, which even Respondent does not dispute, has been illustrated within the last week. Six private American citizens were arrested and jailed in Serbia on March 21, 1998. Lee Hockstader, Jailing of 6 Americans by Serbia Condemned, Wash. Post, Mar. 22, 1998 at A29 (copy attached as Exhibit 1). The Post article pointed out that "efforts by American diplomats to visit the six were unavailing." *Id.* Accordingly, while the Post does not disclose whether the arrested Americans had been notified of their right to consult with American diplomats, it makes clear that their right to consular access, likewise guaranteed by the Convention, was being denied. The Serb rejoinder to the protest of this behavior by the United States could well be that since "neither your states nor your courts observe the Convention, why should we."

The Language of Article 36 Creates a Specific Rule Overcoming the General Rule of Default.

Breard does not dispute the general proposition that treaty rights, like constitutional rights, may be defaulted. However, Article 36(2) of the Vienna Convention, which precludes local law from interfering with the implementation of its terms, requires more precise analysis than Respondent would wish. One could imagine a situation where a foreign national knowingly refused to raise the failure of the authorities to comply with the Convention. But these circumstances do not exist here. The Commonwealth of Virginia, in its wilful failure to comply with its duty under the Convention, kept Breard ignorant of his rights. Although he eventually gained access to consular

assistance, he was by then convicted, condemned and, according to Respondent, defaulted. Article 36(2) was deliberately drafted to prevent such injustice from occurring in the name of "local law." The default doctrine and Coleman v. Thompson, 501 U.S. 722, 750 (1991), relied upon by Respondent, therefore, simply do not apply.

The Vienna Convention Rule Was Novel Prior to 1996

Respondent's contention that Breard's Vienna Convention claim was not novel prior to 1996 is premised upon Respondent's misunderstanding of the standard previously established by this Court for determining novelty as a cause for avoiding default. Respondent, like the Court of Appeals, implies that novelty is available only where discovery of a claim is *impossible*. This Court has made clear, however, that novelty, as cause for avoiding default, is available where the "basis for a claim was *not reasonably* available to counsel . . . 'or some interference by officials' . . . made compliance *impracticable* . . . ." Coleman v. Thompson, 501 U.S. at 753 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986). *See also* Amadeo v. Zant, 486 U.S. 214, 221-22 (1988). Certainly, there is no basis for concluding, as the Court of Appeals did, that the legal basis for Breard's claim was reasonably available to counsel merely because of the existence of one unpublished habeas corpus opinion on Lexis and four published deportation case opinions, one of which does not mention the Convention, and three of which, while mentioning the Convention, do not have any criminal law head notes. *See* Footnotes 14 and 15 on page 21 of Breard's Petition for a Writ of Certiorari. Moreover, "Virginia's persistent refusal to abide by the Vienna Convention . . .", Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996), *aff'd sub nom,* Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998) is the type of

interference by officials which made impracticable Breard's assertion of a right under the Convention.

Respondent attempts to undercut the novelty argument by noting that Breard had contended below that his trial counsel were ineffective in failing to raise the claim, however. Breard asserted that claim only in the alternative ("if this court finds that trial counsel should have been aware of the existence of the Convention, which is denied, Petitioner submits . . . ." Petition in the District Court, ¶ 133, App. 158). Such alternative pleading is not an admission that the Vienna Convention claim was known or reasonably should have been known prior to 1996.

Respondent's claim that Breard has speculated "about whether his trial counsel . . . could have secured a plea agreement *if* Breard had been willing to plead . . . " cravenly misrepresents its own conduct in attempting to defeat Breard's claim. It procured and introduced in state habeas proceedings an affidavit by Breard's trial counsel that "the prosecutor . . . had made it clear to us that the Commonwealth would forego the death penalty if Breard would plead guilty." Affidavit, ¶ 5, App. 195. Thus, there can be no doubt that cause and prejudice exist.

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Enforcement of Vienna Convention Rights Will Not Constitute a New Rule

Respondent's "new rule" argument was not embraced by either court below. Novelty, which provides cause for avoiding a procedural default, does not automatically result in the establishment of a new rule. Article 36 of the Vienna Convention does not impose a new rule, because it neither "breaks new ground" nor "imposes a new obligation on the States or the Federal Government." Teague v. Lane, 489 U.S. 288, 301 (1989). Although the Vienna Convention argument was novel

because it was not reasonably available to Breard until 1996, the Convention has imposed a binding obligation upon the states (of which the U.S. State Department made them aware) for over a quarter of a century. Surely, if "reasonable jurists" had been presented with and addressed the merits of Breard's Vienna Convention claim at the time of his direct appeal, they would have acknowledged the unlawfulness of his conviction. Lambrix v. Singletary, __U.S.__, 117 S. Ct. 1517, 1525 (1997).

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The Convention's Lack of a Specific Remedy Mechanism Should Not Deter this Court from Enforcing Rights Thereunder

Respondent would have this Court ignore fifty years of constitutional law development and close the nation's collective eyes to the state's repeated violations of Article 36 because the Convention does not contain a specific mechanism to remedy violations. No provision of the Bill of Rights or the Fourteenth Amendment provides a specific mechanism to remedy violations of citizens' rights under those guarantees. This Court would have made a mockery of those precious rights if it had followed the course in respect to them which Respondent here proposes. The remedy here is to grant a new trial.

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Breard's Proportionality Review Claim Was Not Defaulted

In the Court of Appeals, Breard asserted four claims in support of his contention that the state's sentence violated federal due process and Furman v. Georgia, 408 U.S. 238 (1972), and its progeny:

1. The prosecutor's decision to seek the death penalty was arbitrary,

2. In Virginia, the death penalty is arbitrarily imposed in capital murder-rape cases,

3. Breard's death penalty was disproportionate to the penalty imposed in similar cases, and

4. The Supreme Court of Virginia's mandatory review was constitutionally defective.

Arguments 1, 2 and 3 were styled Claims III A, III B and III C by the District Court, *see* App. 25-26, and dismissed as defaulted. The District Court did find that the facts supporting No. 3 (III C) had been presented to the state court but without reference to either state or federal law. The Court of Appeals affirmed each of these holdings. App. 9.

With respect to Claim No. 4 (Claim IV in the District Court), the District Court specifically held that the claim had not been defaulted. App. 29-30. That court quoted the following language from Breard's brief on direct appeal to the Virginia Supreme Court to demonstrate the lack of default:

> [A] defendant's liberty interest in proportionality review is violated by the consideration of only those cases which are reviewed by the Virginia Supreme Court. Thus, the Court does not consider those cases in which the death penalty was not imposed, which prevents the Court from reviewing the types of cases in which death was not the appropriate sentence.
>
> For these reasons, the proportionality review conducted by the Court constitutes a violation of the Defendant's due process rights under the Fourteenth Amendment.

App. 29. The District Court erroneously rejected the claim on the merits, however, by equating it to a state law issue. App. 30; *see* Breard's Petition for Writ of Certiorari at 27 n.18.

The Court of Appeals did not deal with the claim at all. App. 09. Respondent's statement to the contrary is wrong and cannot be supported.

Breard's Proportionality Claim Rests on Due Process Considerations Which Are the Province and Responsibility of this Court

Breard's claim that the Virginia Supreme Court violated his life and liberty interest in a state-created right is premised on the Due Process Clause of the Fourteenth Amendment.

Respondent's only response is that this claim is a state issue. Again, Respondent is wrong. The protection of rights guaranteed by the Due Process Clause of the Fourteenth Amendment is ultimately the responsibility of this Court, not state courts. Moreover, whatever deference the Virginia Supreme Court might otherwise be entitled to receive on this issue was lost when that court refused to consider the claim on the merits. *See* App. 29-30.

This Court is considering a similar challenge to state criminal procedures under the Due Process Clause in Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178 (6th Cir.), *cert. granted*, __U.S.__, 117 S. Ct. 2507 (1997). This Court should either grant certiorari in this case as well, or stay this case pending the decision in Woodard.

CONCLUSION

Breard has raised an important federal law claim concerning the Vienna Convention which this Court has not addressed, but which requires resolution for the benefit of lower courts. Breard has also raised an important federal law claim involving the analysis of the denial of due process when a state deprives a defendant of a state-created life and liberty interest.

This case presents those issues clearly and cleanly. For those reasons, Breard requests that this Court issue a writ of certiorari to review this case and grant his forthcoming application for a

stay of execution pending appeal. Such an application has been filed in the Court of Appeals for the Fourth Circuit, and will be lodged or filed in this Court later this week.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petitioner's Reply Brief were hand delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, this 24th day of March, 1998.

Alexander H. Slaughter

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Sunday, March 22, 1998

A Section

Jailing of 6 Americans By Serbia Condemned; U.S. Decries Growing 'Pattern' of Harassment

Lee Hockstader
Washington Post Foreign Service

Six Americans were in jail here tonight in what outraged U.S. diplomats called a case of official anti-American harassment masquerading as a garden-variety technical offense.

Most of the six, who were sentenced to 10-day jail terms for not reporting their presence to local police, are members of a San Francisco-based group called Peace Workers. They had spent at least several days in Kosovo, the volatile southern province of Serbia, Yugoslavia's dominant republic, instructing local ethnic Albanian activists on nonviolent conflict resolution before being arrested late Friday and today, according to U.S. sources.

In another episode involving Americans in the region today, Yugoslav authorities refused to grant visas to 14 members of a bipartisan delegation, including Rep. Jim Moran, a Northern Virginia Democrat, two other congressmen and Ed Turner, CNN editor at large.

The group was attempting to enter the country from neighboring Macedonia to call attention to what it called, in a press release, "the recent reign of terror inflicted on the people of Kosovo" by the regime of Yugoslav President Slobodan Milosevic. Its visit would have coincided with Sunday's elections for president and parliament of Kosovo, an event the Serbian government regards as illegal.

Kosovo, a poor province of Serbia, has a population that is 90 percent ethnic Albanian but is dominated politically by ethnic Serbs. The two communities live so separately -- and unequally -- that the arrangement has been compared to apartheid.

U.S. diplomats in Belgrade were protesting both incidents and trying to arrange for an early release for the Peace Workers volunteers.

EXHIBIT
1

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"There is a developing pattern of clear harassment of Americans," said Robert S. Gelbard, President Clinton's senior representative for U.S. policy on the Balkans. "What they're showing, of course, is gross stupidity. . . . It is likely to produce a harder U.S. attitude" not only within the administration but on Capitol Hill as well.

The arrests and visa denials come amid what appears to be a rising tide of anti-Americanism here in recent days, following a bloody police crackdown in Kosovo in the last three weeks.

More than 80 people died in the crackdown, and Washington vowed to impose further economic sanctions on Belgrade.

The U.S. criticism has whipped up resentment and a mood of victimization among Serbs, who say they were justified in taking harsh measures against what they consider ethnic Albanian terrorists. Even opponents of the government are furious at Washington's threat of new sanctions, believing they will do nothing but deepen sympathy for Milosevic's authoritarian regime and further deplete Yugoslavia's already staggering economy.

Several recent events in Kosovo have angered administration officials. They include a threat about 10 days ago that political analyst Richard Norman -- stationed at the U.S. Embassy in Belgrade -- may be harmed, and Serbian police officers at several checkpoints have threatened to kill American journalists they stopped.

The six Americans who were arrested were staying in private homes in Pristina, capital of Kosovo. According to a Yugoslav law once commonplace throughout Eastern Europe, foreigners visiting the country are required to report their presence to local police wherever they go within three days of arrival. Hotels do this automatically for their guests.

One American diplomat likened the law to ones in the United States proscribing tearing fire-safety tags off mattresses.

The six peace activists apparently failed to register with the police. One, Peter Lippman -- variously described as the group's translator or a journalist, though it was not known for whom he worked -- was arrested and sentenced to 10 days in jail late Friday. The other five were picked up and received identical sentences in separate hearings attended by U.S. diplomats today.

Peace Workers spokeswoman Sandra Schwartz in San Francisco said the group's director, David Hartsough, had taken college students Daniel Perez, Bruce Hemmer, Daniel Sevallos and Teresa Crawford to Kosovo to monitor a March 13 student protest, the Associated Press

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reported.

Efforts by American diplomats to visit the six were unavailing. Serbian authorities said the only official who could authorize such visits was away for the weekend.

Staff writer R. Jeffrey Smith in Rome and special correspondent Colin Soloway in Pristina contributed to this report.

---- INDEX REFERENCES ----

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